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IN THE

Supreme Court of the United States

October Term, 1959

No. 232

MILTON KOBLITZ,

Petitioner,

AGAINST

THE BALTIMORE AND OHIO RAILROAD COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF

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INDEX

PAGE

I. The *Rieser* complaint *did not* in its *second cause* of action set forth a direct cause of action against B. & O. 1

II. The contention that there is no difference between the instant action and the *Rieser* action is erroneous and proceeds from a misconstruction of the instant complaint and from a lack of understanding of the principles governing an action to set aside a fraudulent conveyance 6

III. The issues in the *Rieser* action are defined by the complaint in that action and not by the statements and arguments made in briefs or petitions 8

IV. The respondent has misread the *Koblitz* complaint 9

CONCLUSION 11

CASES CITED

Adler v. Fenton, 65 U. S. 407 7

Baltimore S.S. Co. v. Phillips, 274 U. S. 316 (1926) 10

Duell v. Brewer, 92 Fed. 2d 59 (2 C. C. A. 1937) .. 7

Hilliard v. Sisil, 192 F. 2d 800 (9 C. A. 1951) 7

Rieser, et al. v. The Baltimore and Ohio Railroad Company, 123 F. Supp. 44, 228 F. 2nd 563.... 3, 4, 5

Shepard v. Commissioner of Internal Revenue, 101 F. 2d 595 (7 C. C. A. 1939), cert. den. 307 U. S. 639 7

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I

The *Rieser* complaint *did not* in its *second cause* of action set forth a direct cause of action against B. & O.

The respondent seems most anxious to make this Court believe that in its second cause of action (R. 39a), the *Rieser* complaint set forth a direct cause of action against B. & O.

And starting from that erroneous premise, the respondent argues that the judgments in the *Rieser* action therefore are a bar to this direct and independent action against B. & O.

The respondent is in error.

At page 4 of its brief the respondent says:

> "Under the heading 'For a Second Cause of Action', the *Rieser* complaint claimed on behalf of Alton bondholders against B & O on a legal theory of independent right that ran: (a) the 'acts and transactions' of B & O which constituted a tort against Alton also constituted a direct tort (fraud) against Alton bondholders; and, hence, (b) Alton bondholders may claim against B & O in their own right (R. 39a)."

And on the same page 4, the respondent says:

> "* * * In an opinion deciding that motion (Pet. 18), the district court described the *Rieser* complaint as asserting a claim under two legal theories, (i) a theory of derivative right against B & O, i.e., an action by bondholders in their 'capacity (as) creditors in aid of execution' of their debtor's claim against B & O (Pet. 20), and (ii) a theory of direct right against B & O for 'fraud * * * upon the Alton bondholders' (Pet. 23)."

And at pages 9 and 10 of its brief, respondent says:

> "* * * Furthermore, Koblitz is clearly in error in suggesting that the complaint in the *Rieser* action did not proffer the legal theory of 'direct' right of recovery (Pet. 4-5). In the so-called 'Second Cause of Action' of the *Rieser* complaint, Koblitz claimed on behalf of Alton Bondholders on a theory of direct tort by B. & O. against those bondholders. Thus, the 'Second Cause of Action', after repeating and realleging every allegation of the 'First Cause of Action', further alleged that:

'The acts and transactions complained of also constitute a fraud practiced by the defendant upon * * * the holders of Alton Bonds, including the plaintiffs' (R. 39a)."

With respect to the causes of action in the *Rieser* case, Judge Murphy in his opinion (123 F. Supp. 44, 52, Pet. p. 32), said:

"* * * The language of this complaint indicates plaintiffs are asserting, not a claim of their own, but one which is an asset of their debtor Alton. For example, plaintiffs allege in paragraph 16 that they:

'* * * are in the position of creditors who have secured judgment establishing their claims and have issued executions which have been satisfied to the extent of 37½ cents in respect of each dollar of principal amount and otherwise returned unsatisfied.'

"And in paragraph 17 they allege:

'The claim asserted against the defendant in this action constitutes the only asset on which the unsatisfied claims of the holders of Alton Bonds may be satisfied.'"

And with respect to the second cause of action, Judge Murphy said (123 F. Supp. p. 53, Pet. pp. 33-34):

"* * * In the second count of their complaint, plaintiffs allege that the 'acts and transactions complained of also constitute a fraud practiced by the defendant upon Alton and the holders of Alton Bonds, including the plaintiffs' and the 'facts constituting said fraud were not discovered by the plaintiffs or any of them until long after the institution of the Reorganization Proceeding.'

> "Such 'allegations of the complaint' may well be 'mere conclusions and even if accepted as allegations of fact they are only incidental to the cause of action brought against defendants on the ground that they have disregarded their duty to the corporation. Such allegations do not constitute a cause of action "to procure a judgment on the ground of fraud" * * * under the provisions of section 48, subdivision 5, of the Civil Practice Act, * * *.'"

The Court of Appeals in affirming the *Rieser* judgment said (228 F. 2nd 563, 564, 565, Pet. pp. 39-40):

> "2. A judgment-creditor, with execution returned unsatisfied, may, without relying on a statute, by an 'old-fashioned' creditors' bill, have an equitable levy on an available asset of his debtor. The asset may consist of a claim against a third person for a wrong that person did to the debtor. If that wrong be regarded as also done to the creditor, it is only an indirect wrong, and the creditor's suit is derivative, in effect.
>
> "However, plaintiffs contend that they suffered a direct and independent injury, apart from that done to Alton, and that a cause of action based on such injury accrued only after they had obtained a judgment with execution thereon returned unsatisfied. The crucial question here is whether the alleged acts of B. & O. (a) constitute harms to Alton and but indirectly to plaintiffs, Alton's bondholders, and/or (b) constitute harms done directly to those bondholders. Absent a statute,* we think they clearly came within the first category."

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* The Court of Appeals had in mind Section 15 of the New York Stock Corporation Law, which makes certain acts also direct wrongs against creditors and gives creditors a direct remedy.

The statement in the *per curiam* opinion of the Court of Appeals (by a different panel) that

> "* * * In addition to the estoppel of the former judgment we find that the basic point now argued as to whether the source of appellant's claim is derivative or direct, was determined in the appeal to this Court from the adverse judgment in the prior action. *Rieser* v. *Baltimore & Ohio R.R.*, 2 Cir., 1955, 228 F. 2d 563. Thus appellant is bound not only by a direct but also by a collateral estoppel." (Pet 16)

is erroneous.

"Whether the source of appellant's claim is derivative or direct" was not an issue in the *Rieser* action.

The plaintiffs in that action sought to recover in the right of Alton upon a claim which the complaint in that action alleged—but erroneously—Alton had against B. & O.

The lower courts, upon the complaint before them, accepted for the purpose of the motion the truth of the allegations therein set forth, and held that such a claim in the right of Alton, was outlawed and therefore not available.

A perusal of the opinions of the lower courts in the *Rieser* action, will convince this Court that (a) the respondent is in error because the second cause of action in the *Rieser* complaint did not set forth a direct cause of action against B. & O. and that (b) the Court of Appeals, in the instant action, is in error when it said that "whether the source of appellant's claim is derivative or direct was determined in the appeal to this Court from the adverse judgment in the prior action".

II

The contention that there is no difference between the instant action and the *Rieser* action is erroneous and proceeds from a misconstruction of the instant complaint and from a lack of understanding of the principles governing an action to set aside a fraudulent conveyance.

The respondent sees no difference between the instant complaint (R. 2a-9a) and the complaint in the *Rieser* action (R. 28a-40a). The respondent says (Br., p. 6):

> "* * * The single difference between the two complaints is that the Koblitz complaint alleges that B. & O. performed its tortious acts (frauds) in concert and conspiracy with Alton, whereas the Rieser complaint did not thus charge Alton (Pet. 9)."

The respondent is in error.

In the *Rieser* action the plaintiffs sued to recover against B. & O. in the right of Alton upon a claim which plaintiffs in that action believed Alton had against B. & O. The complaint in that action alleged that (R. 31a) "in violation of its fiduciary duties * * * the defendant * * * caused loss and injury to Alton".

The instant complaint charges that Alton conveyed corporate opportunities to B. & O. in fraud of Alton's creditors. Unlike the complaint in the *Rieser* action, the instant complaint (R. 2a-9a) makes no charges of wrongdoing by B. & O. against Alton.

This is a direct and independent action and not a derivative action.

This action is brought in behalf of Alton's bondholders to set aside fraudulent conveyances made by Alton to B. & O., pursuant to a conspiracy to defraud Alton's creditors. B. & O. was not liable in tort for conspiring with Alton to defraud Alton's Bondholders. *Adler* v. *Fenton*, 65 U. S. 407; *Duell* v. *Brewer*, 92 Fed. 2d 59 (2 C. C. A. 1937).

However, B. & O. is liable to account for property fraudulently conveyed to it.

In *Shepard* v. *Commissioner of Internal Revenue*, 101 F. 2d 595 (7 C. C. A. 1939), cert. den. 307 U. S. 639, the Court said at page 599:

> "The theory of these holdings is that courts of equity will protect creditors from fraudulent action on the part of debtors by holding the recipient of the debtor's property as trustee thereof for the benefit of creditors of said debtor."

See also:

Hilliard v. *Sisil*, 192 F. 2d 806 (9 C. A. 1951).

Plaintiff seeks to have restored to Alton's creditors the profits and benefits which B. & O. derived from the corporate opportunities fraudulently conveyed to it by Alton because these opportunities cannot now be restored to the creditors.

The corporate opportunities fraudulently conveyed were intangibles and an accounting is necessary to determine the amount of those profits.

The allegations in the complaint that B. & O. conspired with Alton and that it participated in the fraudulent conveyances to it by Alton were put into the *Koblitz* complaint to show that B. & O. had guilty knowledge of Alton's fraudulent intent when it (B. & O.) accepted these conveyances from Alton.

The complaint against B. & O. is that it was the recipient of those corporate opportunities and benefits and seeks an accounting because it was the fraudulent grantee of those corporate opportunities and benefits.

III

The issues in the *Rieser* action are defined by the complaint in that action and not by the statements and arguments made in briefs or petitions.

In its brief (p. 10), the respondent says:

> "Koolitz fully intended that the legal theory of direct right of recovery alleged in the 'Second Cause of Action' should be in issue in the *Rieser* litigation. He made that amply clear in his briefs to the court of appeals and in his petition to this Court for a writ of certiorari."

And then follow excerpts from the briefs in the Court of Appeals in that case and from the petition to this Court for a writ of certiorari.

Briefs are not pleadings.

It is quite evident that the plaintiffs in the *Rieser* action soon realized that they had brought the wrong action.

But the issues in that case were fixed by the *Rieser* complaint and could not be changed by statements in briefs and petitions.

Hence the instant action upon proper allegations.

IV

The respondent has misread the *Koblitz* complaint.

At page 6 of its brief, the respondent says:

> "* * * Its (The Koblitz complaint's) factual allegations were conceded below, and are conceded here (Pet. 5, 8), to be substantially identical with those of the Rieser complaint. * * *"

And at pages 8 and 9 of the respondent's brief, the respondent says:

> "* * * Koblitz concedes that the *Rieser* complaint, and the complaint in the instant action allege exactly the same injury to the same property by reason of the same acts by B & O (Pet. 5). Since Koblitz has not pleaded operative facts different in any way from those pleaded in the *Rieser* action, he has not pleaded a new cause of action."

And at page 8, in attempting to distinguish the *Bogert* case from the instant case, the respondent says:

> "* * * But here, the two claims remain identical in all essential respects. Koblitz in both actions has relied upon the same alleged acts of B & O, all purportedly occurring prior to the Alton reorganization decree (May 31, 1947). In each case Koblitz has sued to recover the same debt (the bonded indebtedness) out of the assets which B & O is alleged wrongfully to have withheld or received prior to 1942 from the Alton * * *."

The respondent is mistaken.

Koblitz makes no such concessions.

And the two actions (the *Rieser* action and the *Koblitz* action) are not identical.

Necessarily the facts which are set forth are those which actually existed.

As this Court said in *Baltimore S.S. Co.* v. *Phillips*, 274 U. S. 316, 321 (1926):

> "A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. * * * 'The facts are merely the means, and not the end. They do not constitute the cause of action, but they show its existence by making the wrong appear. "The *thing*, therefore, which in contemplation of law as its *cause* becomes a ground of action, is not the group of *facts* alleged in the declaration, bill or indictment, *but the result of these in a legal wrong the existence of which, if true, they conclusively evince.*"' *Chobanian* v. *Washburn Wire Company*, 33 R. I. 289, 302."

In the instant case, the facts as alleged, spell out a direct cause of action by a judgment creditor against a fraudulent grantee for an accounting.

IN CONCLUSION

In the interest of justice, it is respectfully submitted that the petition for a writ of certiorari should be granted, in order that the Alton Bondholders may be allowed to prosecute the cause of action which was awarded to them in the reorganization proceeding of Alton.

Respectfully submitted,

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